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May 7, 2008

Jeff Oliveira
John Nall
County of San Luis Obispo
Department of Planning and Building
County Government Center, Room 200
San Luis Obispo, California 93408-2040

Subject: Pankey Conditional Use Permit
San Miguel, San Luis Obispo County
Mitigated Negative Declaration ED06-181
DRC2005-00193

Dear Messrs. Oliveira and Nall:

The Department of Fish and Game has reviewed the proposed Mitigated Negative Declaration (MND) for the Pankey Condition Use Permit for a 55.65-acre sand and gravel mining operation on the Salinas River in the vicinity of San Miguel. The Department has concerns about impacts of this Project, alone and cumulatively, to the Salinas River; as well as concerns regarding the use of a Negative Declaration for review of the Project. We continue to recommend that the County include this Project in an Environmental Impact Report (EIR) that would address impacts of several new gravel mining projects which are currently under consideration by the County on the Salinas and Estrella rivers.

California Environmental Quality Act (CEQA) Authority: The Department is a Trustee Agency with the responsibility under CEQA for commenting on projects that could impact plant and wildlife resources. Pursuant to Fish and Game Code Section 1802, the Department has jurisdiction over the conservation, protection and management of fish, wildlife, native plants and habitat necessary for biologically sustainable populations of those species. As a Trustee Agency for fish and wildlife resources, the Department is responsible for providing, as available, biological expertise to review and comment on environmental documents and impacts arising from project activities, as those terms are used under CEQA.

The Department is a Responsible Agency when a subsequent permit or other type of discretionary approval is required from the Department, such as an Incidental Take Permit, pursuant to the California Endangered Species Act (CESA), or a Streambed Alteration Agreement issued under Fish and Game Code Sections 1600 et seq.

Pursuant to Fish and Game Code Section 1600 et seq., the Department has regulatory authority with regard to activities occurring in streams and/or lakes that could adversely affect any fish or wildlife resource. Given the Project description, this Project would require a Streambed Alteration Agreement, and the Project proponent should submit a Streambed Alteration Notification to the Department for this Project. For additional information on notification requirements, please contact our staff in the Stream Alteration Program at (559) 243-4593.

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In addition, although no State-listed species were detected during surveys in 2007, subsequent biological studies may reveal that a State Incidental Take Permit is required to comply with CESA. Both Responsible Agency actions by the Department are considered "projects" (CEQA Guidelines Section 15378) and are subject to CEQA; the Department typically relies on the Lead Agency's CEQA compliance to make our own findings. For the Lead Agency's CEQA document to suffice for permit/agreement issuance, it must commit to fully describing the potential project-related impacts to stream/riparian resources and listed species, as well as measures to avoid, minimize and mitigate impacts to these resources. Impacts to State-listed species must be additionally "fully mitigated" in order to comply with CESA. If the CEQA document issued by the County for this Project does not contain this information, the Department may need to act as a Lead CEQA Agency and complete a subsequent CEQA document. This could significantly delay permit issuance and, subsequently, Project implementation. In addition, CEQA grants Responsible Agencies authority to require changes in a project to lessen or avoid effects of that part of the project which the agency will be called on to approve, such as the would be required with a Streambed Alteration Agreement (CEQA Guidelines Section 15041).

California Endangered Species Act Compliance: The Department has regulatory authority over projects that could result in the "take" of any species listed by the State as threatened or endangered, pursuant to Fish and Game Code Section 2081. If the Project could result in the "take" of any species listed as threatened or endangered under CESA, the Department may need to issue an Incidental Take Permit for the Project. CEQA requires a Mandatory Finding of Significance if a project is likely to substantially impact threatened or endangered species (Sections 21001(c), 21083, Guidelines Sections 15380, 15064, 15065). Significant impacts must be avoided or mitigated to less than significant levels in order for "take" authorization to be issued by the Department, and while the CEQA Lead Agency may make a supported Statement of Overriding Considerations (SOC), the Department cannot issue a "take" authorization unless all impacts have been "minimized and fully mitigated" (Fish and Game Code Section 2081).

The CEQA Lead Agency's SOC does not eliminate the Project proponent's obligation to comply with Fish and Game Code Section 2081, under which impacts to State threatened and endangered species must be minimized and fully mitigated. In other words, compliance with CESA does not automatically occur based on local agency project approvals or CEQA compliance; consultation with the Department is warranted to ensure that Project implementation does not result in unauthorized "take" of a State-listed species.

Incidental "take" authority is required prior to engaging in "take" of any plant or animal species listed under CESA. Plants listed as threatened or endangered under CESA cannot be addressed by methods described in the Native Plant Protection Act. No direct or indirect disturbance, including translocation, may legally occur to State-listed species prior to the applicant obtaining incidental "take" authority in the form of an Incidental Take Permit.

Proposed Sand and Gravel Mine: The Project description identifies an expected yield of material 145,000 cubic yards annually from the Salinas River and Vineyard Creek (although the Balance Hydrologics analysis indicates that it is proposed to extract 120,000 cubic yards in the Salinas River and 40,000 cubic yards in Vineyard Creek). The MND makes some assumptions about the amount of material present and the rate of recruitment, including response of the river

system to the mining operation. These assumptions have not been clearly identified, and the Department would like to review those in anticipation of processing an application for a Streambed Alteration Agreement for the Project. This is a new mine, and thus does not have a history of operations and extraction volumes to guide determination of the appropriate level of sustainable extraction. As such, we do not believe it appropriate to permit this as an allowable use when the amount of a sustainable operation is unknown and confounded by other current and proposed projects on the Salinas River.

The MND indicates the need for a monitoring program which would specify the establishment and monitoring of cross sections, which would be surveyed before and after the extraction operation each season and which would be "designed to document geomorphic changes over time, provide data for adaptive management practices that can identify and mitigate potentially adverse conditions." There is no Monitoring Program or Plan that is included in the MND, and so it is impossible to understand how the information would be utilized to "reduce impacts to a less than significant level." The monitoring would presumably be conducted to determine if the extraction operation is sustainable, but no thresholds are specified for making changes or protocol identified to determine what appropriate revisions to the operation would be warranted. We would like to work with the applicant and the County to develop a process and thresholds for ensuring that the operation is conducted in a sustainable manner.

It is notable that the referenced Balance Hydrologics report identifies some additional studies which should be done to fully characterize the stream and the potential for impacts from the gravel extraction, specifically Sediment Replenishment Estimates and other analyses, which to date have not been done. They also recommend that the County could also "consider the cumulative impacts to the Salinas River due to proposed additional aggregate extraction downstream of already existing operations. We anticipate that (the County) will find that the proposed extraction volume plus that which is extracted upstream at existing facilities exceeds the likely range of bedload replenishment to the proposed reach of mining... For planning purposes, establishment of a reasonable range of sediment replenishment rates is suggested because NOAA Fisheries (2004) recommend holding extraction rates to no more than 50% of the replenishment rate." Although the MND references the NOAA recommendation, it does not require it.

The Department has concerns regarding the implementation of this Project as it may affect steelhead (*Oncorhynchus mykiss*, California Species of Special Concern, Federal Threatened). The MND should address temporary and permanent impacts to steelhead and steelhead habitat, including direct, indirect and cumulative impacts. The Upper Salinas River is federally designated Critical Habitat for the south/central California coast Evolutionarily Significant Unit (ESU) of steelhead and provides passage and habitat for the species. Temporary and permanent direct impacts may result from water diversion, sand and gravel extraction, modifications to the channel, water quality impacts, reduced infiltration and increased runoff. This Project, in conjunction with the currently operating gravel mines on the Salinas River, could be cumulatively significant; when the several other projects that the County is currently considering are factored in (Pehl, Viborg, Weyrich, etc.), there could be significant and potentially unmitigable impacts to this species.

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The proposed Project is bounded on the northwest (downstream) end by the Department's Big Sandy Wildlife Area. We are concerned about this Project being conducted immediately upstream of our Wildlife Area and the potential impacts that the extraction of sand and gravel from the site, as well as from a number of existing and other proposed new mines along the Salinas River, would have on riverine and riparian resources for which the Wildlife Area was established.

Recommended Use of an EIR/Cumulative Biological Impacts: The Department has recommended and continues to recommend that this Project be analyzed with an EIR; that document would allow the County to identify alternatives which may better address some of our concerns regarding the direct, indirect and cumulative impacts this Project may have.

The MND identifies impacts to riverine resources, without completely characterizing those impacts, and includes some mitigation measures to offset the impacts of the Project, such as setbacks, distance to the water table and season of operation. We believe the finalization of mitigations, such as setbacks, are best determined after potential Project impacts have been completely characterized. We recommend that the County, with input from the Department, utilize an EIR to analyze potential Project impacts, determine their significance and identify alternatives/measures which would mitigate potential impacts to a level of less-than-significant.

Cumulative impact analyses should be species and habitat specific and should be quantified. Cumulative impacts must consider past, present, and foreseeable future projects (CEQA Guidelines Sections 15065, 15130, and 15355). The MND for this Project considers only the direct impacts of this Project and does not address the effects of projects which are currently proposed nor does it consider related effects of past projects. In particular, we are very concerned that this Project be evaluated in consideration of steelhead, for which past, present and future projects on the Salinas River and its tributaries affect the same population.

Thank you for your consideration of our comments. We remain available to work with you to develop an environmental document which will address both the County's and the Department's needs for review of this Project. If you have any questions regarding our comments, please feel free to contact Deborah Hillyard, Staff Environmental Scientist, at (805) 772-4318, or via email at dhillyard@dfg.ca.gov.

Sincerely,



W. E. Loudermilk
Regional Manager

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